No...

IN THE

SUPREME COURT

of the

UNITED STATES OF AMERICA

March term 1992

DOUGLAS J. MICHELSON,

petitioner,

vs

COMMISSIONER OF INTERNAL REVENUE,

respondent,

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Tenth Circuit

APPENDIX A

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1.

United States Court of Appeals for the Tenth Circuit

Douglas J. Michelson, petitioner appellant,

v. no.90-9020

Commissioner of Internal Revenue, respondent, appellee,

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order entered March 25, 1992

Before McKay, Chief Judge, Holloway, Barrett, Logan Seymour, Moore, anderson Tacha, Baldock, Brorby, and Ebel, Circuit Judges.

We consider appellant's motion to reconsider filed January 3, 1992 his motion for extension of time and " motion

to reconsider and Suggestion for En Banc Hearing and Memorandum Brief" filed Feb 27,1992, as a timely petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition is denied by the panel that rendered the decision.

In accordance with Rule 35 (b) Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active services on the court having requested that the court be polled on rehearing en banc, rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered by the court, Robert L. Hoecker, Clerk, by Patrick Fisher, Chief Deputy Clerk

2.

United States Court of Appeals for the Tenth Circuit

Douglas J. Michelson, petitioner, appellant,

v no 90-9020

Commissioner of Internal Revenue, respondent, appellee,

On appeal from the decisions of the United States Tax Court , [illegible] court numbers 8130-82, 18686-84,16775-85

Mathew E Cohen and Roy A Anuskewicy, jr. Albuquerque, New Mexico on the briefs for petitioner-appellant.

Shirley D. Peterson, Assistant Attorney General, and Gary R. Allen, Kenneth L Greene, and Steven W. Parks, Department of Justice, Washington, D.C. on the brief for Respondent-Appellee.

Before McKay, Chief Judge, and Barrett and Brorby, Circuit Judges.*(footnote at end)

Brorby, Circuit Judge

Mr. Michelson appeals from the decisions of the United States Tax Court entered July 26,1990, determining deficiencies in his federal income tax for the years 1976-81. We affirm those decisions.

The issues in this case derive from the financial losses Mr. Michelson sustained as a result of his transactions involving metal futures (primarily silver) on various commodity exchanges.

Characterization of Mr. Michelson's losses was the principal issue before the tax court. Mr Michelson asserts he was a dealer in metals. As such, he contends the losses resulting from the 1979 and 1980 futures transactions were ordinary rather than capital losses. On Appeal Mr. Michelson challenges the tax court's factual findings that: (1.) Mr. Michelson was not engaged in a trade or business as a dealer in metals in 1979 and 1980; (2.) the losses Mr. Michelson sustained in 1979 and 1980 were capital losses; (3.) the portion of the 1980 loss allegedly attributable to Merrill Lynch's liquidation of his commodity account was not sustained in 1980; and (4.) Mr. Michelson did not pay interest on his margin accounts in excess of the amounts allowed by the Commissioner of Internal Revenue. IN addition , he challenges the

tax court's refusal to admit as evidence a federal district court memorandum opinion and order from a related , but independent civil action. We address each challenge separately.

I. "The clearly erroneous test of Rule 52 a is the appropriate standard for appellate review of factual findings...." Sanchez v. Bond 875 f2d 1488, 1495, (10th cir 1989)., cert denied, 11 s ct 340, 1990. This standard is met only when this court, after reviewing the record ,is left with a ".definite and firm conviction". that a mistake has been made. Merchants's Nat"l Bank of Topeka v CIR 554 f2d 412, 415 (10th cir 1977) (quoting United States v United States Gypsum co. ,333 US 364, 395, (1948).

Our review of the records leads us to believe the tax court made no factual mistake in this case. The record amply

supports the tax court's findings. For example, as to the tax court's characterization of Mr. Michelson as an investor who suffered capital rather than ordinary losses, the record indicates that prior to 1979, Mr. Michelson characterized his occupation as "investments" and reported his transactions to the revenue service accordingly. He never filed a schedule c reporting his commodity transactions as involving gains or losses from the operations of a business until he sustained large trading losses on the silver futures market in 1979-80. Notably, Mr. Michelson's market transactions in 1979-80 were not materially different from those in earlier years. At no time was Michelson licensed to sell futures, nor was he a member of any commodity exchange.

Despite Mr. Michelson assertion's he was a dealer in metals, the record reflects the only physical metals ever owned by Mr. Michelson were 400 ounces of gold and 1,510,225 pounds of copper, held by means of negotiable warehouse receipts. Mr. Michelson acquired these metals on the commodity market and held both for a long period of time as one would an investment. The record further indicates that although Mr. Michelson's losses were due primarily to fluctuations in the silver market, he never owned any silver in its physical form. Moreover, the record reflects no acquisition of metal directly from any refinery or any off exchange supplier, no separate business activity that utilized metals, and no frequent sales to customers or related merchandising activity.

With regard to the tax court's finding that the portion of the 1980 loss allegedly attributable to Merrill Lynch's liquidation of his commodity account was not sustained in 1980, the record indicates Mr. Michelson maintained five counts on a counterclaim in an unresolved, independent action to recover those losses against Merrill Lynch. The tax court resonably inferred from Mr. Michelson's refusal to answer a question on cross-examination that he had previously assured the government he would prevail in that action.

Finally, with regard to the payment of interest on Mr. Michelson's margin accounts, the exhibits relied upon by Mr. Michelson do nothing more than illustrate the amount of interest charged. These documents are not sufficient to show that Mr. Michelson in fact paid these amounts,

or that the interest paid exceeds that allowed by the Commissioner. Testimony in the record supports this finding.

Mr. Michelson sought to introduce a Memorandum opinion and order of the United States District Court for the District of New Mexico involving an independent civil action between Mr. Michelson and Merrill Lynch. In essence, the order dismissed twelve of seventeen counts asserted in Mr. Michelson's counterclaim against Merrill Lynch. Mr. Michelson offered the order as evidence he was a "dealer" in metals. An introductory paragraph described Mr. Michelson as "a dealer in precious metal". The tax court refused to admit the order as evidence , observing that Mr. Michelson had not shown that the description of him as a "dealer" was anything more than background material

,or that his alleged status as a dealer was a disputed issue resolved by the court in that case. Moreover, the government was not a party to that suit, and what might constitute a dealer for the purposes of the issues involved in that case was not controlling n the federal income tax context. As such, the tax court held the proffered evidence lacked any probative value. We agree.

On appeal, Mr. Michelson also contends the tax court erred in declining to admit the order as evidence that he lacked a reasonable prospect of recovery in that suit and hence sustained those losses allegedly attributable to Merrill Lynch's liquidation of his commodity account in 1980. This argument fails for two reasons. First, Mr. Michelson failed to offer the memorandum opinion and order for that purpose. Second, while the order

dismissed several counts of Mr. Michelson's counterclaim, five counts remained. Nothing in the record indicates that the remaining counts do not assert claims for the full recovery of the losses allegedly attributable to Merrill Lynch's actions in 1980.

"The decisions to admit or exclude evidence is within the sound discretion of the (trial) court, and , on appeal, reviewable only for an abuse of discretion. " Boren v. Sable 887 f2d 1032, 1033. (10th cir 1989). The tax court did not abuse its discretion in this instance.

In conclusion, we hold the tax court's findings are not clearly erroneous. Furthermore, the tax court acted within its discretion when it refused to admit another court's opinion into evidence for the purpose for which

it was being offered. We therefore AFFIRM the tax court's decision for substantially the same reasons as those set forth in its thorough Memorandum Opinion, entered January 16,1990. 58 TCM (CCH) 1219 (1990) .

*(footnote) After examining the briefs and the appellate record, this three judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See fed. r App. P.34. a ;10th cir r 34.1.9. The cause is therefore ordered submitted without oral argument.

EXPLANATION RELEVANT TO THE ABOVE..

After submitting an inadequate brief which constitutes malpractice, Mathew Cohen submitted his withdrawl motion. It is supposedly on that brief and those

issues which the court ruled. They did not fairly considered the issue of law and law and fact, and of a fair trial, raised on appeal and preserved in the record of the trial court. Certainly withdrawl is indicative of a problem in the appeal "so easily ruled upon" . To say that they are reviewing only finding of fact of the tax court is a laugh. That is inadequate review, if there are errors preserved at trial, which there were. Appellate courts generally have to take findings of fact as they find them. Given that, they in fact did not consider in depth the problems at trial and in law. On the motion to reconsider (brief in chief) resubmitted, at least twenty grounds of review were sought to have ruled upon by the court of appeals in a reconsideration brief. They would not review what was required to review, but

merely procedurally cheated Michelson of his-appeal, with the complicity of his "attorney" who had withdrawn.

3.

Tax Court Memo 1990-27

United States Tax Court

Douglas J. Michelson, petitioner v. CIR, respondent, docket nos. 8103-82, 18686-84, 16775-85,
filed January 16,1990.

Douglas J. Michelson,pro se.
Linda L. Wong, and Val J. Albright, for the respondent.

MEMORANDUM FINDING OF FACT AND OPINION

Parker, Judge: In these consolidated cases, respondent determined deficiencies in petitioner's federal income tax as follows; 1976 $77,996; 1977 $ 14,212;

1978 $12,049; 1979 $93,631; 1980 $ 305,653, 1981 $35,360.

Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954, as amended and in effect for the taxable years in question, and all rule references are to the Tax court rules of Practice and procedure.

This case arises in the context of the attempt by the Hunt family and the Conti group to corner the silver market in late 1979 and early 1980. The principal issue for decision is whether losses sustained by petitioner (primarily in silver futures transactions on various commodity exchanges) are capital or ordinary. The transactions resulting in the losses occurred in 1979 and 1980, an petitioner claims net operating loss carrybacks and carryovers to the other years involved in this case.

Alternatively, as to the January 10,1980, transactions in which Merrill Lynch Pierce Fenner and Smith,inc. (hereinafter "Merrill Lynch") liquidated petitioner's positions in his commodity account, the issue is whether that liquidation resulted in losses sustained at that time and deductible in 1980. If there was a reasonable prospect of recovery in subsequent years because of petitioner's pending litigation against Merrill Lynch in regard to that liquidation, then it cannot be said that the loss was "sustained" in 1980. sec 1.165- 1d 2i, income tax regs. Apart from various expense deductions that respondent conceded at trial,(footnote one at end) there remain issues as to the amounts and year of deductibility of certain interest paid on petitioner's Merrill Lynch and Ef Hutton margin account.

FINDINGS OF FACT

At the time he filed his petition in this case, petitioner Douglas J. Michelson (hereinafter petitioner) resided in Albuquerque, New Mexico. Petitioner filed his individual Federal income tax returns (forms 1040) for the years 1976 through 1981 with the Internal Revenue Service Center at Austin, Texas, except for the 1978 return that was filed in Fresno California; with the returns for 1979 and 1980, petitioner for the first time filed schedule c's on which he claimed to be a dealer in metals.

Petitioner was graduated from the University of New Mexico with a bachelor's degree in finance. He immediately went into the family business, Bell Trading Post, inc later known as the Sunbell Corporation (hereinafter Sunbell). Sunbell was a

manufacturer of silver, turquoise, and copper jewelry and also leather products and copper giftware. At one time Sunbell had four factories in three different states and a nationwide sales force. In 1964, Sunbell had 100 employees and by 1976-78 ,it peak years had 1000 employees. Both petitioner and his brother served on the Board of Directors of, and worked for, the family business. The brother was in charge of manufacturing and petitioner was in charge of data processing department. AT one time petitioner also ran Sunbell's subsidiary corporation, Decor Industries, inc, located in Dallas, Texas. Decor INdustries dealt in alumnium castings. After petitioner returned from Texas to Sunbell's headquarters in Albuquerque, New Mexico , h was involved in setting up the company's inventory method (LIFO

method) . IN the early 1970's petitioner sold his interest in the family business and was not thereafter involved in Sunbell's business operations.

Petitioner entered politics and in 1972 was elected to a four year term in the state legislature. He ran for re-election in 1976 but was unsuccessful. Petitioner's income producing activities thereafter were those of an investor. In 1974, while he was still serving as a state legislator, petitioner opened a commodity account with the local Albuquerque office of Merrill Lynch, a stock and commodity brokerage firm. While the record is not entirely clear, apparently the account was opened as a trade or hedging account, rather than as a speculative, account. A significant difference between the two is that the margin requirements on a trade or hedging

account are about half as much as those on a speculative account. By 1976 petitioner also had some type of account with EF Hutton, another stock and commodity brokerage firm.

Petitioner obtained loans pursuant to a lines of credit with the First National Bank in Albuquerque, and he used the proceeds of those loans, together with other funds from his stock and cash management accounts, to meet the initial margin requirements and margin calls by Merrill Lynch on his commodity account. IN February 1978 petitioner, as the debtor, executed a Security Agreement, Assignment of Hedging Account, to the First National Bank of Albuquerque, as the secured party. The bank also took petitioner's commodity warehouse receipts as additional collateral for the loans. There is an ongoing dispute between

petitioner and Merrill Lynch as to whether petitioner's commodity account was a trade or hedge account, as petitioner contends, or a speculative account, as Merrill Lynch contends. By 1979 and 1980 Merrill Lynch was taking the position that petitioner's commodity account was a speculative account. (see footnote 2 at end) .

On his Federal income tax returns for 1978 petitioner listed his occupation as "investments" and reported substantial capital gains as follows: 1976 Interest income $, 48,480 , dividend income $50,394, capital gains income $151,307; 1977 interest income $48,488, dividend income $38,892, capital gains income $9,134; 1978 interest income $ 52,992, dividend income $45,420, capital gains income $8,142.

Petitioner also reported small amounts of rental income or losses in those years; he did not report any wage income or any schedule c income or losses from a trade or business. ON his schedule a's for those years, petitioner deducted substantial amounts of interest expense paid to Merrill Lynch, EF Hutton and the First National Bank in Albuquerque, and (and other banks) and also deducted substantial amounts of investment expenses as miscellaneous itemized expenses. The investment expenses were described as relating to something called "Rembrandt Investment" in which petitioner was described as an "investor". The investment expense were deducted as miscellaneous itemized expenses on schedule a and included, amount other things, "commodity expense" or "commodity storage fees" in the

amounts of $9,915.,$8,463, $$15,213 for 1976, 1977,1978 respectively.

Beginning with his opening of the commodity account with Merrill Lynch in 1974, petitioner over the years purchased some copper and gold (see footnote 3) which he held by means of negotiable warehouse receipts. Metal in proper form to be delivered through the commodity exchanges is normally stored in public warehouses approved by the exchanges and is transferred by means of negotiable warehouse receipts so as to obviate the need for the seller to have the metal assayed at the time of delivery. The record does not establish that petitioner ever bought any copper ,silver, or gold or any other metal from a refinery or any other supplier, or in other words, except in a transaction on a commodity exchange. Petitioner is not a broker, an dhe must

conduct any transactions on the Chicago Board of TRade (CBOT) , the New YOrk Commodity Exchange (COMEX) , or any other commodity exchange through a licensed broker such as Merrill Lynch or EF Hutton.

A commodity futures contract is a promise by the person in the "short" position to deliver (sell) and by the person in the " long" position to take delivery of (buy) a fixed quantity of a commodity of a certain grade at a fixed price during a specified delivery month and year. (see footnote 4) While the year an delivery month are fixed, the person who is to deliver or sell the commodity (the person in the "short" position) has the option as to the day of the specified month on which he will make delivery. The parties to any commodity futures contract always have the right to

offset rather than make or take delivery. Most commodity futures contracts are closed out by offset rather than by actual delivery of the commodity, but of course actual delivery does sometimes occur. Petitioner, for example, actually took delivery of some copper and gold. By January 1,1979 ,petitioner had acquired through transactions on the commodity exchange 1,510,225 pounds of copper. Some of the copper had be acquired in 1974 (7 contracts) ,some in 1975, (21 contracts), and the rest in 1977 (30 contracts) for a total of 58 contracts. Normally, a contract for copper is 25,000 pounds, but there may be some minor variations. Also petitioner had acquired 400 ounces of gold in September of 1975. A contract for gold is 100 troy ounces of a certain fineness.

As of January 1,1979 petitioner owned and held by means of negotiable warehouse receipts 1,510,225 pounds of copper and 400 ounces of gold. During the years 1979 and 1980 petitioner never owned any silver. (see footnote 5) The record does not establish that he ever owned any silver metal in deliverable form at any time from 1974 through the end of 1980.

In early 1979 petitioner went to California to look for a job or some business opportunity. He returned to Albuquerque, new Mexico after three or four months. Both before and after his trip to California, petitioner entered into various commodity futures contracts in copper, gold, and silver, which resulted in the losses involved in the case. see n. 4 supra. Most of the losses were incurred in silver transactions. A

silver contract is for 5,000 troy ounces of silver of a specified fineness. IN 1978, petitioner had entered into five commodity futures contracts to deliver silver (to sell silver, ie. short positions) as follows:

(Chart I.)

#	EXCH	DATE	DELIVERY	PRICE	PROCEEDS
1.	CBOT	11-16-78	Dec 1980	$6.92	$34600
2.	CBOT	11-17-78	DEC 1980	$6.99	$34950
3.	CBOT	11-17-78	Dec 1980	$6.99	$34950
4.	CBOT	11-30-78	APR 1979	$6.13	$30650
5.	COMEX	11-30-78	Apr 1979	$6.15	$30750
6.	CBOT	01-22-79	Feb 1981	$7.43	$37150
7.	CBOT	01-25-79	APR 1981	$7.68	$38400
8.	CBOT	02-07-79	Aug 1981	$8.64	$43240
9.	CBOT	05-01-79	Dec 1981	$9.70	$48500
10.	CBOT	08-08-79	Jun 1982	$11.15	$55750
11.	CBOT	08-31-79	Dec 1979	$10.49	$52475
12.	CBOT	11-27-79	Aug 1982	$21.60	$108000
13.	CBOT	12-10-79	Apr 1982	$23.45	$117250
14.	CBOT	12-31-79	Jun 1981	$32.37	$161860
15.	CBOT	12-31-79	Jun 1981	$31.17	$155860
16.	CBOT	01-02-80	Aug 1981	$33.97	$169870
17.	CBOT	01-03-80	Apr 1981	$34.09	$170470

((Chart 1 at end of footnotes shows reduced original because certain headings were changed in order to reduce the width and render it here. This chart is not all of Michelson's transactions in order of execution, it is merely selected losses in silver,"gains and others never were charted.")

In 1979 and 1980, according to petitioner's expert, Dr. Teweles, silver and to a lesser extent gold, witnessed ' one of the most spectacular bull markets in history". For a number of years before that time silver had hovered around $4.00 to $6.00 a troy ounce. The price began rising in early 1979, and from about mid 1979 through January of 1980, the price rose spectacularly from about $10 to $50 an ounce. As was later learned in investigations by the Congress and by various Federal Agencies, the silver market was manipulated by the Hunt family and the Conti group in an effort to corner the silver market. (see footnote 6) Between January 1979 and January 1980, the price of silver rose 675 percent from $6.50 to $50.35 per troy ounce. On January 21, 1980 prices began to decline and continued to decline

steadily until late March of 1980. On Thursday March 27,1980 (referred to as "Silver Thursday") silver dropped to $10.50 an ounce. The precipitous decline was even more dramatic than the run-up in price. The efforts of the Hunt family and the Conti group to corner the silver market collapsed when they ran short of money and , as Dr. Teweles described the situation, "couldn't keep the play going". The result was, in Dr. Teweles' words , the " most devastating collapse of any futures market in history."

While the market price of silver was rising dramatically and petitioner had not physical silver (no "cash silver" as it is called) , he also had no long positions in silver futures contracts to take delivery of or buy any silver. Petitioner instead continued to enter into short positions and to meet

increasing margin calls on his sort positions despite the advice of a representative of Merrill Lynch that he should be in long positions or at least in some long positions. The Merrill Lynch representative also advised petitioner not to meet margin calls, because, in the representative's opinion, meeting a margin call was merely throwing good money after bad when the market was telling you that you were in the wrong position. Merrill Lynch representatives became more insistent in their advise and finally they told petitioner that the course of action he was pursuing amounted to "financial suicide." For some unfathomable reason, petitioner took Merrill Lynch's advise as some type of threat directed against himself. All of the 17 silver futures contracts listed above by the date on which petitioner

entered into the contract) were closed out with losses on each transaction as follows:

(footnote Chart II.)

#	CLOSED	PRICE	PROCEEDS	LOSS
1.	12-28-79	$29.72	$148610	(-114010)
2.	12-31-79	$30.84	$154210	(-119260)
3.	01-10-80	$36.80	$184000	(-149050)
4.	04-16-79	$7.29	$36450	(-5800)
5.	05-25-79	$8.83	$44175	(-13425)
6.	01-10-80	$37.25	$186250	(-149100)
7.	01-02-80	$32.99	$164970	(-126570)
8.	01-03-80	$35.17	$175870	(-132630)
9.	01-10-80	$39.50	$197500	(-149000)
10.	1-10-80	$40.76	$203845	(-148095)
11	12-04-79	$19.55	$97750	(-45275)
12.	1-10-80	$41.16	$205825	(-97825)*
13.	1-10-80	$40.37	$201860	(-84610)
14.	1-10-80	$38.20	$191000	(-29140)
15.	1-10-80	$38.20	$191000	(-35140)

16.1-10-80 $38.65 $193250 (-23380)

17.1-10-80 $37.75 $188750 (-18280)

*Petitioner failed to claim this loss on his 1980 tax return, but if petitioner otherwise prevails, respondent agrees that loss should be allowed.

(chart II above originally was what is a combined chart I and chart II; in order to include it in the page width we only included the new loss and closing price information on chart II. reading chart I above and chart II together by reference to the number makes it usable here as intended. Chart II as it originally appeared appears reduced at the end of the footnotes with original complete headings. Headings were abbreviated above.)

In each of the 17 transactions summarized above , petitioner was in the short position (a contract to deliver

silver) and, not having any silver to deliver, had to close out the position by offset and always at a price higher than the contract price. The prices at which petitioner agreed to deliver silver under the contracts varied from a low of $6.13 for a contract entered into in November 1978 to a high of $34.094 for a contract entered into on January 3,1980. The prices at which the contracts were closed out varied from a low of $7.29 per troy ounce in April of 1979 to a high of $41.165 on January 10,1980. Petitioner describes the closing of transactions by offset as "switches" and suggests that his "switches" merely extended his delivery dates. However, his "switches" resulted in part of the losses he claims in this case. Also, the rising market price of silver resulted in increased margin calls, each $1.00 increase in the

price of silver making each silver contract (5,000 troy ounces) cost an additional $5,000.

Petitioner's expert testified that in a rising market the place to be is in the long position, not the short position. Dr. Teweles further testified that when prices rise the person in the short position get increasing margin calls but for the person in the long position " the increase in price, of course, would be delightful". Except perhaps in the sense of offsetting his positions in lieu of delivery, the record does not establish that petitioner ever entered into a long position in any of his silver futures contracts. Of all of the transactions involved in the net losses claimed in this case, in only two transactions (five contracts for December 1980 copper and seven contract

for February 1980 gold) was petitioner in the long position. The five contracts for December 1980 copper, entered into on February 9,1979 ,were closed out by offset on October 4,1979 at a profit of $21,625. The seven contracts for February 1980 gold , entered into on January 7,1980 ,were closed one day later and resulted in a loss of $9,735.50 Petitioner's explanation of this one day foray was that he was somehow 'testing the liquidity of the market" in gold.

Petitioner continued to meet all margin calls on his silver contracts, which were quite substantial. Finally, on January 10,1980, the New York office of Merrill Lynch, acting in what it regarded as its fiduciary duty and obligation to protect its customer (i.e. to protect petitioner from himself) , liquidated and closed all of petitioner's positions in

his commodity account. The record is not entirely clear as to whether petitioner had failed to meet Merrill Lynch's last margin call. The period for meeting a margin call for a commodity account is briefer than for a stock account. The record does not show when petitioner received that last margin call or the deadline to meet it. Petitioner denied that he failed to meet that margin call and insisted that on January 11,1980 he went to the local office of Merrill Lynch in Albuquerque with the money to meet the call, only to learn that his positions had been liquidated the preceding day.

Thereafter Merrill Lynch brought suit against petitioner for the deficit balance in his commodity account, and petitioner counterclaimed against Merrill Lynch for, among other things, the alleged improper liquidation of his

commodity positions. That litigation was still pending at the time of the trial of this case. (see footnote 7 at end) . Of the $1,303,976.30 losses claimed by petitioner in 1980 , $1,034, 930. of that amount resulted when Merrill Lynch liquidated the remaining positions in petitioner's account on January 10,1980.

The 17 silver futures contracts detailed above plus a few futures transactions in copper and gold resulted in the losses of $304,895 for 1979, and $1,303, 976. for 1980. (see footnote 8 at end)

After the losses in the commodity futures transactions were sustained in 1979 and 1980, petitioner for the first time filed schedule c's with his tax returns. ON those schedule c's , petitioner claimed to be a dealer in metals and claimed to the losses as

ordinary losses rather than capital losses. (see footnote 9)

On audit respondent disallowed $31,170 of the total interest expense of $72,000 claimed by petitioner in 1978 on his schedule a. The claimed interest expense involved $17, 249 to Merrill Lynch and $13,921 to EF Hutton. Respondent conceded at the beginning of the trial that $31,016.80 of that amount is properly deductible as a schedule a interest expense item, as follows: Merill Lynch $17,248.71, and EF Hutton $13,768.09. There is no evidence in the record in regard to the balance of the interest disallowed. The EF Hutton statement for the month of December 1978 merely shows the amount charged and is not proof that petitioner in fact paid that amount in 1978.

In support of his deductions of interest paid to Merrill Lynch on his margin account in 1979, petitioner submitted one page of a Merrill Lynch statement on Account 433-13024 (not the commodity account) for the month of December 1979. That statement shows a margin interest charge for the month of December of $4,370. (actually $4369.59) and a year to date amount of $29,576. Petitioner argues that this statement shows the "charge was a reduction in the balance" and hence constituted payment. However, both the opening and closing figures on that account were negative, and the court cannot find that the amount of interest was actually paid in 1979 by petitioner, a cash basis taxpayer. Similarly, the EF Hutton statement for December 1979 shows a charge of $20,864.67 for margin interest, but there

is no evidence that petitioner actually paid that amount in 1979. Respondent determined that petitioner had paid margin interest of $26,920 to Merrill Lynch and $15,908 to EF Hutton. Petitioner has not proved that he paid any amounts of margin interest in 1979 in excess of the amounts allowed by respondent. For 1980 respondent increased petitioner's interest expense deduction, but treated all of it as a schedule a itemized deduction.

As to various expense itemized on petitioner's schedule c for 1981 that respondent disallowed on audit, respondent at the beginning of the trial conceded that certain items had been substantiated but respondent takes the position that these items are only deductible on schedule a as deductions under section 212. There is no evidence

in the record to support either the amount or the deductability of any remaining schedule c items disallowed.

ULTIMATE FINDINGS OF FACT

1. Petitioner was not engaged in a trade or business as a dealer in metals n 1979 and 1980.

2. The losses petitioner sustained in 1979 and 1980 in certain commodity futures transactions were not hedging losses.

3. IN his commodity futures transactions in 1979 and 1980 , petitioner was acting as an investor or as a speculator on his own account and the losses he sustained were capital losses.

4. As to the portion of the 1980 loss attributable to Merrill Lynch's liquidation of his commodity account, petitioner has not established that the

portion of the loss was " sustained " in 1980.

5. Petitioner has not established that he paid interest on hsi margin accounts with MerrIll Lynch and EF Hutton in excess of the amounts allowed by respondent.

OPINION

The primary issues in this case is the proper characterization of the net losses on commodity futures, principally silver futures, as ordinary or capital. This depends on whether the commodity futures were "capital assets" within the meaning of section 1221. The term "capital assets" is defined in section 1221 as "property held by the taxpayer (whether or not connected with his trade or business)," with certain specific exceptions. The only exception on which petitioner can rely is section 1221 (1)

which excludes from the term "capital asset" "stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. "

Petitioner contends he was a dealer in metals and the commodity futures contracts were hedging transactions integral to his trade or business as a metals dealer. Respondent contends petitioner was a speculator trading on his own account or an investor, either of whom hold the commodity futures as a capital assets. IN various contexts the terms, "dealer," trader" , and "investor" become significant for Federal tax purposes.

In different contexts where the tax issue turns on whether or not the person is engaged in a trade or business, a distinction is drawn between a trader (one dealing on his own account in securities or commodity futures) who is considered to be engaged in a trade or business and an investor who is not. Higgins v. Commissioner, 312 US 212 (1941) (business expense deduction under predecessor of section 162); Moller v Commissioner, 721 f2d 810 (fed cir 1983) (office in the home expense under section 280a); King v Commissioner, 89 TC 445, (1987) investment interest limitation under section 163 d (see footnote 10 at end) See also Groetzinger v Commissioner, 82 TC 793, 800-801 (1984) affd 771 f2d 269 (7th cir 1985) affd 480 US 23 (1987). However, the characterization of property as a

"capital asset" vel non does not turn on whether the taxpayer is engaged in a trade or business, whether he has a business motive for acquiring or holding the property, or whether the property is "connected with his trade or business."sec 1221. Arkansas Best Corp v. Commissioner 485 US 212 (1988) Thus, the distinction between a trader and an investor has no bearing on the determination of whether securities or commodity futures are capital assets in the hands of the particular taxpayer since such securities or commodity futures would be capital assets in the hands of either a trader or an investor. King v Commissioner 89 TC at 458 and n5.

In transactions involving securities or commodity futures, a distinction is also drawn between a trader and a dealer. Whether a particular taxpayer is a dealer

or a trader is a question of fact. Kemon v Commissioner 16 TC 1026 (1951) In Kemon, 16 TC at 1031, 1033 ,we explained the distinction between a dealer and a trader as follows: "In determining whether a seller of securities sells to "customers" the merchant analogy has been employed... Those who sell to customer are comparable to a merchant in that they purchase their stock in trade, in this case securities, with the expectation of reselling at a profit, not because of a rise in value during the interval of time between purchase and resale, but merely because they have or hope to find a market of buyers who will purchase from them at a price in excess of their cost. This excess or mark up represents renumberation for their labors as a middle man bringing together buyer and seller, and performing the usual

services of retailer or wholesaler or goods...Such sellers are known as "dealers".

Contrasted to " dealers" are those sellers of securities who perform no such merchandising functions and whose status as to the source of supply is not significantly different from that of those to whom they sell. That is, the securities are as easily accessible to one as the other and the seller performs no services that need be compensated for by a mark-up of the price of the securities he sells. The sellers depend upon such circumstances as a rise in value or an advantageous purchase to enable them to sell at a price in excess of cost. Such sellers are known as "traders".

See also Adnee v. Commissioner, 41 TC 40 (1963) (see foootnote 11)

Petitioner tries to bring himself within this "merchant analogy". Petitioner does not, however, claim to be either a dealer or a trader in commodity futures. IN fact, he denies any dealing in commodity futures, insisting that he deals not with commodity futures but with the physical metals themselves. See n 4 supra. Petitioner says he is a dealer in metals, that he earns his living buying metal for his "inventory" and selling metals from this "inventory". He insist the commodity futures were merely hedging transactions in connection with his metals business, apparently invoking the presumed judicial exception of Corn Products REfining co v Commissioner, 350 US 46, (1955) to section 1221. However, see and compare Arkansas best Corp v Commissioner supra. . Unfortunately for petitioner, the record in this case

simply does not establish that he had any trade or business separate and apart from his transaction on the commodity exchange.

The court reaches that conclusion despite the fact that petitioner over the years had acquired some copper and gold that he held by means of negotiable warehouse receipts. He had held that metal for rather long periods of time , two years or more, having acquired it in the period from 1974 through 1977. Thus the metal itself had the characteristics of an asset held for investment purposes , a capital asset, and not an "inventory" item. Moreover, that metal too was acquired through transactions on commodity exchanges. There is no evidence in the record that petitioner ever acquired any metal directly from a refinery or any other off exchange

supplier. Also, while petitioner did own this copper and gold , he never owned any silver, and most of the losses in this case involved silver futures. see n 5. supra. Finally , the record reflects no frequent sales of metals by petitioners to customers, or related merchandising activity, such as advertising and sales calls, of sufficient frequency and scope to rise to the level of a "trade or business". Groetzinger v Commissioner, supra.

Petitioner's expert, Dr. Teweles, testified that petitioner's commodity account with Merrill Lynch was a hedging account. However, it is evident from his testimony that Dr. Teweles believed that petitioner was engaged in some business separate and apart from the commodity futures transactions themselves. Dr. Teweles' contacts with petitioner in

advance of the trial were quite minimal . The court is satisfied that Dr. Tewweles did not have the slightest inkling that petitioner's alleged metals business was nothing more than these commodity futures transactions themselves. Also, even as to his characterization of the commodity account as a hedging account, Dr. Tewlees relied upon his belief that Merrill Lynch had determined that the account was a hedging account. Dr. Teweles agreed that if Merrill Lynch had not determined it to be a hedging account, his conclusion would be different. Merrill Lynch regarded the account as a speculative account , at least by 1979 and 1980 see n 2 supra. While Dr. Teweles is a well qualified professor of finance and knowledgeable in the commodities field , his conclusions were based upon misconceptions of the underlying facts of

this case. Accordingly , the court disregards Dr. Teweles conclusions as unsupported by the facts of record.

It is clear to the Court that petitioner is trying to concoct a trade or business out of his commodity futures transactions. Petitioner says he is in the physical metals business (which the record does not support), that these commodity transactions involved the same kind of physical metals in which he allegedly dealt (which is contrary to the record, particularly in regard to silver) and that that makes his losses ordinary rather than capital losses. So far as the record shows, the transactions in commodity futures in 1979 and 1980 did not differ from petitioner's earlier commodity futures transactions from 1974 through 1978 when he was admittedly an investor, reporting income from interest,

dividends, and capital gains. It was only after he sustained the huge losses during the Hunt family silver debacle that petitioner for the first time filed schedule c's and claimed to be a a dealer in metals.

As the facts of this case establish, petitioner was an investor or a speculator trading on his own account in commodity futures. He performed no merchandising functions. He had no customers who regularly purchased either commodity futures or metals in the ordinary course of business. As we noted in Kemon v Commissioner 16 TC at 1033, petitioner's "source of supply" (the commodity exchanges) was not significantly different from that of those to whom he sold (those on the opposite side of his commodity futures contracts). All of petitioner's commodity

transactions were handled through Merrill Lynch. He was not licensed to sell commodity futures nor was he a member of any commodity exchange. See Mirro-Dynamics v. United States, 374 f2d 14,(9th cir. 1967) cert denied 389 US 896 (1967). Nor was petitioner engaged in any separate business which utilized copper, gold, or silver. Thus, the commodity futures transactions were neither a hedge against raw materials used in a business nor purchases to insure a steady supply of raw material. Corn Products Refining co. V Commissioner, supra; Sicanoff Vegtable OIl Corp v Commissioner, 27 TC 1056, (1957) revd on other grounds 251 f2d 764. (7th cir (1958).

Petitioner's short positions in silver could not guarantee him a minimum sales price since he had no silver to

sell; his short positions could not provide him with any supply of or promise of supply of any silver such as a long positions might have. Thus, petitioner's reliance on the example of a corn farmer engaging in futures transactions is completely inapt. The corn farmer with a corn crop growing n the field enters into a futures contract to deliver or sell corn at a certain price (short positions) to guarantee a minimum price at which he can later sell his crop; the corn farmer may also enter into futures contracts to receive delivery of or buy corn at a certain price ("long positions ") to guarantee a supply of corn at a certain price if his corn crop should fail or fall short of his expectations. petitioner cannot come within this traditional type of hedging transaction as he argues. Nor can petitioner bring

himself within the judicial exception of the Corn Products doctrine, which at a bare minimum requires that the taxpayer have some separate trade or business apart from the commodity futures transactions themselves. (see footnote 12)

Never the less, Dr. Teweles attempted to label petitioner's commodity futures transactions as an "anticipatory hedge" , even if he did not own any silver at the time. Again, Dr. Teweles was assuming, contrary to the facts, that petitioner was engaged in a metals business separate and apart from the commodity futures transactions themselves . Since petitioner did not have any other business and since he did not have and had never had any silver in his so called "inventory" , the logic of the situation is that petitioner was gambling that

silver prices would fall and that he could obtain the silver at prices less than the prices in his short positions. There is an indication in the record that petitioner believed the Federal Government would step in and force down the price of silver. That did not happen. With the price of silver continuing to escalate dramatically during the Hunt family's foray into the silver market, petitioner, against the advice of his broker, continued to enter only short positions to deliver silver he did not have and silver which he could obtain (actually or by offset) only at ever increasing prices. The Court agrees with Merrill Lynch's warning to petitioner that this was tantamount to "financial suicide." petitioner's transactions simply do not come with the merchant category, either actually or by analogy.

As the Supreme Court's opinion in Arkansas Best Corp. v Commissioner , supra , teaches us, section 1221 defines "capital asset" broadly, the statutory exceptions are the exclusive exceptions to that definition, the motive with which the taxpayer acquires or holds the property is irrelevant (i.e. that the taxpayer acquires or holds the property for a business purpose is irrelevant), an whether the property is "connected with his trade or business" is irrelevant. What is determinative, the Supreme Court teaches us, is whether the taxpayer can bring himself within one of the specific statutory exceptions to the definition of "capital asset" . The Corn Products case itself involved the application of section 1221's inventory exception, with the Supreme Court stating therein, (350 US at 50) that the company's futures

transactions were "an integral part of its business designed to protect its manufacturing operations against a price increase in its principal raw material and to assure a ready supply for future manufacturing requirements. " As our findings of fact and the discussion above amply demonstrate, petitioner had not metals business apart from the commodity futures transactions themselves. Petitioner was speculating on his own account. What we said in Kemon v Commissioner, supra 16 TC at 1032,in regard to securities is equally applicable to commodity futures , namely, "Whether or not securities are held primarily for sale to customers in the ordinary course of business is a question of fact, Stern Brother and co. 16 TC 295, in which the crucial phrase is "to customers." This phrase and the word

"ordinary" were added to the definition of capital assets by Senate Amendment no 66 n the Revenue Act of 1934 so that a speculator trading on his own account could not claim the securities he sold were other than capital assets. The theory of the amendment was that those who sell securities on an exchange have no "customers" and for that reason the property held by such taxpayers is not within the above quoted exclusionary clause. DL Burnett, 40 BTA 605, 118 f2d 659, Thomas E wood 16 TC 213."

Those who merely buy or sell on a commodity exchange, as petitioner did , have not "customers" and are not engaged in a trade or business as a merchant, either actually or by analogy. The court concludes that petitioner was either an investor or a speculator trading on his own account as to these commodity

futures. In either capacity, the commodity futures contracts were capital assets in his hands and his losses therefrom were capital losses.

In the notice of deficiency for 1980, respondent alternatively determined that petitioner had not established " that transactions which occurred on or about January 10,1980 as a result of the liquidation of your brokerage account were closed transactions or that there was not reasonable prospect of recovery with respect to the losses ($1,034,930.) claimed. ..."

The issue having been raised in the notice of deficiency, petitioner bears the burden of proof. Welch v. Helvering, 290 US 111, 115, (1933) rules 142a. Petitioner has failed to sustain that burden.

The record contains little information about the litigation between Merrill Lynch and petitioner. See n 7 supra. However, in that litigation petitioner counterclaimed against Merrill Lynch contending the liquidation of his commodity account was improper. That litigation was still pending at the time of the trial of this case. We agree with respondent that petitioner has not established that in 1980 there was no reasonable prospect of recovery with respect to #1,034,930 of the loss claimed for that year. Accordingly, we cannot find that the portion of the 1980 loss was "sustained" in that year. Sec 1.165-1 d 2 i, Income tax regs.

The final issue is the interest on petitioner's margin accounts with EF Hutton and Merrill Lynch . Section 163 a allows as a deduction "all interest paid

or accrued within the taxable year on indebtedness." The narrow issue is the amount such margin account interest that petitioner, a cash basis taxpayer, actually paid in each of the year , 1978, 1979, and 1980. The EF Hutton and Merrill lynch statements upon which petitioner relied merely show the amount of such interest that was charged by EF Hutton or Merill Lynch each year. Those statements do no prove the amount that petitioner actually paid each year. Petitioner has not established that he actually paid any margin account interest in excess of the amounts allowed by respondent.

To reflect respondent's concessions and the above holdings,

Decision will be entered under rule 155.

FOOTNOTES;

(Footnote 1)While respondent concedes that various expenses have been substantiated and are deductible, respondent does not agree that these are schedule c business expenses. Respondent contends that they are instead deductible under section 212. An issue was raised as to the statute of limitations for the taxable year 1981, but the parties' oral stipulation on the record as to the date of mailing of the deficiency notice and PS form 3877 (stipulated) into evidence show that the notice was timely mailed; petitioner received the notice and timely filed his petition in this Court. That disposes of the statute of limitations issue. Mulvania v Commissioner, 81 TC 65 (1983) Frieling v Commissioner 81 TC 42 (1983). Petitioner's further arguments on this matter are frivolous.

(footnote 2.)This dispute consumed much trial time and seems to loom large in petitioner's view of the case. Petitioner seeks to draw the issue narrowly as to whether his commodity account was a trade or hedging account or a speculative account, apparently assuming that if it can be characterized as a hedging account that automatically guarantees ordinary loss treatment for Federal income tax purposes. Petitioner's expert Dr. Richard J. Teweles , concluded that petitioner had a hedging account, but based his conclusion on the fact that Merrill Lynch had, he (Dr Teweles) believed, determined that it was a hedging account. Dr. Teweles relied almost entirely on what he thought was Merrill's determination. Dr. Teweles candidly admitted that if Merrill Lynch had not determined it to be a hedging

account, then his conclusion would be different. A representative of Merrill Lynch testified that the account number was that of a speculative account rather than a hedging account and that petitioner was using the account in 1979 and 1980 to speculate. We need not, however, resolve the dispute. Whether this commodity account in 1979 and 1980 was a hedging account or a speculative account may well have significance for purposes of the Commodity exchange act, 7 USC secl, et seq., and the regulations of the various commodity exchanges and probably for purposes of Merrill Lynch's determination of proper margin calls on petitioner's account, but is not determinative of the tax issues before the Court. If it were necessary to make a finding, we would accept the testimony of the Merrill Lynch representative and find

that in 1979 and 1980 petitioner had a speculative account or at least was using his account to speculate.

(footnote 3) The record is not clear that this copper and gold metal generated the commodity expenses or commodity storage fees that petitioner deducted on his schedule a's in 1976 ,1977, and 1978. However, the 1,510,225 pounds of copper and 400 ounces of gold petitioner held January 1, 1979, are the only actual physical metal that petitioner has established that he ever owned in the period from 1974 through the end of 1980. The record, although quite extensive with over 1,000 pages of transcript, is singularly devoid of any information as to petitioner's alleged transactions in metal , other than the few transactions on the commodity exchange that resulted in the large losses claimed on his 1979

and 1980 tax returns, which are the subject of this lawsuit.

(footnote 4) While petitioner denies he dealt in commodity futures contracts and insists he dealt only in the actual physical metals themselves, he is either engaged in a semantical quibble over words or his argument is not supported by the facts of record.

(footnote 5) When pressed on this point, petitioner insisted he did own some silver (the physical metal as opposed to commodity futures contracts for silver). However, he then conceded that the silver he owned was silver coins, which were not in proper form for delivery on an exchange and which he regarded as collector's items held for investment purposes.

(Chart I) insert

(footnote 6) Petitioner devoted much of the trial time to the details of this attempt to corner the silver market, a matter which apparently is involved in his ongoing litigation against Merrill Lynch and various other brokerage firms and individuals. However, it is not necessary in this case to go into the details of that attempt, a comprehensive statement of which is set forth in H Rept. no 97-395 (1981) entitled "Silver Prices and the Adequacy of Federal Actions in the Marketplace, 1979-80, Seventeenth Report of the Committee on Government Operations together with Separate and Dissenting Views." While that 173 page report outlines various problems, there was little unanimity on the matter and most of the complex financial and regulatory issues are still unresolved or in litigation in various

courts in numerous lawsuits. There seems to be agreement that the Hunt family, and the Conti Group got control of large concentrations of physical silver (referred to as "cash silver" and also used the futures market for additional deliveries of case silver.

(footnote 7) Petitioner offered into evidence a copy of a Memorandum Opinion and Order of the United States District Court for the District of New Mexico , filed August 12,1982. Petitioner offered that document because of the statement on the first page that "Defendant Michelson is a dealer in precious metals," asking us to take judicial notice of that fact. We refused to receive the document for that purpose. As we have pointed out in other cases, "The mere fact that court in one opinion makes findings of fact is not a basis for the same or another court in

another proceeding to take judicial notice of those findings and to deem them to be indisputably established for purposes of the pending litigation." Estate of Reis v. Commissioner 87 TC 1016, 1028-29 (1986) . Se also Moore v Commissioner, TC Memo 1989-306. Moreover, respondent is not a party to nor in privy with any party to that Merrill Lynch-Michelson litigation; the matter came up on plaintiff Merrill Lynch's motion for summary judgment and was not an adjudication on the merits. Also, we do not know whether MIchelson's status as "a dealer in precious metals" was in issue in that case. IN any event, that case would not be determinative of his status for Federal tax purposes. Finally, we may take judicial notice of adjudicative facts not subject to reasonable dispute which are either generally known within

the jurisdiction of the Court or capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Petzoldt V Commissioner 92 TC 661, 674, (1989). Petitioner's status as a dealer in metals vel non is not such a fact. That district Court Memorandum Opinion and Order, while not admitted into evidence, remains associated with the files of the present case. That document does not cast much light on the issues that the District Court disposed of by summary judgment nor does it tell us anything about the issues that remain in controversy in that litigation. Other than that document there is no information in our record in regard to the pending Merrill Lynch-Michelson litigation.

(Footnote 8) Petitioner denies that he claimed losses, but that is the bottom

-line result. As a matter of mechanics, for 1979 petitioner reported the proceeds on the sale of certain copper (the physical metal or "cash copper") on a schedule c as gross receipts or sales of $460,050. Petitioner then treated the so called "hedging losses" of $304,895 as an adjustment to "inventory," i.e. ,as the alleged cost of acquiring additional "inventory" , and thus effectively deducted the losses as part of costs of goods sold. Similarly, for 1980 petitioner reported proceeds on the sale of some more copper and the 400 ounces of gold as gross receipts or sales of $733,335. Petitioner than treated the so called "hedging losses" of $1,303,977. ass an adjustment to "inventory", I.e. as the alleged cost of acquiring additional "inventory" ,and thus effectively deducted the losses as part of costs of

goods sold. The copper was sold in transactions on the commodity exchange by actual delivery but the gold was sold din an off exchange transaction to a bank in Canada. The $302,000 proceeds from the gold sale and the $431,335 from the copper sales were used to pay off petitioner's loan from the First National Bank of Albuquerque. On November 7,1979, the bank had made another loan to petitioner, and as a result held petitioner's note for $720,000 and also held the certificate for the gold and the warehouse receipts for the copper as additional collateral on that loan.

(footnote 9) These schedule c's were prepared by petitioner himself and submitted to his accounting firm Peat Marwick, Mithchell. The accounting firm simply recopied the schedule c as prepared by petitioner; the accounting

firm did not conduct any audit, review, or verification of any of the figures or of any underlying documentation. Petitioner's attempt to suggest otherwise was refuted by the crystal clear and candid testimony of the Peat Marwick Mitchell representative whom the court found to be wholly credible and worthy of belief. Petitioner's testimony in regard to the preparation of the schedule c was deceptive and lacking in candor. The peat Marwick Mitchell representative also testified that the accounting firm did not maintain petitioner's books and records, but merely prepared petitioner's tax returns, another matter on which petitioner was less than candid with the Court.

(footnote 10) See also Asch v Commissioner, TC memo 1986-238; Zambakian v Commissioner ,TC Memo 1986-219.

(footnote 11) See also Huebschman v Commissioner, TC Memo, 1980-537; Ferguson v Commissioner, TC memo, 1974-244.

(footnote 12) We need not and do not address the question of whether the Corn Products doctrine retains any vitality after the Supreme Court's opinion in Arkansas Best Corp v Commissioner, 485 US 212,(1988). Suffice it to say here, even before the Supreme Court's Arkansas Best opinion and even assuming the full vitality of the Corn Products doctrine in its most expansive interpretation, petitioner could not prevail.

CHART I

Exchange	Date of Contract	Delivery Month & Year	Price Per Troy Ounce*	Contract Price (Proceeds to be Received for Delivery of 5,000 Troy Ounces of Silver)
CBOT	11-16-78	Dec. 1980	$6.9200	$34,600
CBOT	11-17-78	Dec. 1980	6.9900	34,950
CBOT	11-17-78	Dec. 1980	6.9900	34,950
CBOT	11-30-78	Apr. 1979	6.1300	30,650
COMEX	11-30-78	May 1979	6.1500	30,750

*The prices are carried out to the fourth decimal place merely because they are shown that way on the Merrill Lynch statements (but without the decimal points which the Court has added for clarity, since otherwise the "69200" might be mistaken for $69,200 instead of $6.92).

In 1979, petitioner entered into 10 more commodity futures contracts to deliver silver as follows:

Exchange	Date of Contract	Delivery Month & Year	Price Per Troy Ounce	Contract Price (Proceeds to be Received for Delivery of 5,000 Troy Ounces of Silver
CBOT	01-22-79	Feb. 1981	$ 7.4300	$ 37,150
CBOT	01-25-79	Apr. 1981	7.6800	38,400
CBOT	02-07-79	Aug. 1981	8.6480	43,240
CBOT	05-01-79	Dec. 1981	9.7000	48,500
CBOT	08-08-79	Jun. 1982	11.1500	55,750
CBOT	08-31-79	Dec. 1979	10.4950	52,475
CBOT	11-27-79	Aug. 1982	21.6000	108,000
CBOT	12-10-79	Apr. 1982	23.4500	117,250
CBOT	12-31-79	Jun. 1981	32.3720	161,860
CBOT	12-31-79	Jun. 1981	31.1720	155,860

In early 1980, petitioner entered into two additional commodity futures contracts to deliver silver as follows:

Exchange	Date of Contract	Delivery Month & Year	Price Per Troy Ounce	Delivery of 5,000 Troy Ounces of Silver)
CBOT	01-02-80	Aug. 1981	$33.9740	$169,870
CBOT	01-03-80	Apr. 1981	34.0940	170,470

CHART II

Date of Contract	Price Per Troy Oz.	Contract Price (Proceeds to be received for delivering 5,000 oz.)	Date Closed Out (by offset)	Price Per Troy Oz. to Close Out	Amount to Close Out Position (Price x 5,000 Oz.)	Loss on Transaction*
11-16-78	$ 6.9200	$ 34,600	12-28-79	$29.7220	$148,610	($114,010)
11-17-78	6.9900	34,950	12-31-79	30.8420	154,210	(119,260)
11-17-78	6.9900	34,950	01-10-80	36.8000	184,000	(149,050)
11-30-78	6.1300	30,650	04-16-79	7.2900	36,450	(5,800)
11-30-78	6.1500	30,750	05-25-79	8.8350	44,175	(13,425)
01-22-79	7.4300	37,150	01-10-80	37.2500	186,250	(149,100)
01-25-79	7.6800	38,400	01-02-80	32.9940	164,970	(126,570)
02-07-79	8.6480	43,240	01-03-80	35.1740	175,870	(132,630)
05-01-79	9.7000	48,500	01-10-80	39.5000	197,500	(149,000)
08-08-79	11.1500	55,750	01-10-80	40.7690	203,845	(148,095)
08-31-79	10.4950	52,475	12-04-79	19.5500	97,750	(45,275)
11-27-79	21.6000	108,000	01-10-80	41.1650	205,825	(97,825)**
12-10-79	23.4500	117,250	01-10-80	40.3720	201,860	(84,610)
12-31-79	32.3720	161,860	01-10-80	38.2000	191,000	(29,140)
12-31-79	31.1720	155,860	01-10-80	38.2000	191,000	(35,140)
01-02-80	33.9740	169,870	01-10-80	38.6500	193,250	(23,380)
01-03-80	34.0940	170,470	01-10-80	37.7500	188,750	(18,280)

*Petitioner on his tax returns computed the losses resulting from the contracts closed in 1979 exclusive of broker's commissions and fees, but computed the losses resulting from the contracts closed in 1980 inclusive of those commissions and fees. For consistency, the Court has listed all of them exclusive of those expense items.

**Petitioner failed to claim this loss on his 1980 tax return, but if petitioner otherwise prevails, respondent agrees that loss should be allowed.